No. 01-15

In the Supreme Court of the United States

ALEE CELLULAR COMMUNICATIONS, PETITIONER

v.

FEDERAL COMMUNICATIONS COMMISSION

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE FEDERAL COMMUNICATIONS COMMISSION IN OPPOSITION

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QUESTION PRESENTED

Whether the court of appeals erred in affirming the Federal Communications Commission's revocation of a license because of lack of candor on the part of the applicant, based on the court's finding that the Commission's determination was supported by substantial evidence.

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OPINIONS BELOW

The order of the court of appeals (Pet. App. 1a-3a) is unreported. The opinion of the Federal Communications Commission on reconsideration, released Oct. 18, 1999 (Pet. App. 4a-29a) is reported at 14 F.C.C.R. 18,524, and the Commission's initial opinion, released June 3, 1997 (Pet. App. 30a-97a) is reported at 12 F.C.C.R. 8148. The decision of the Review Board is reported at 9 F.C.C.R. 5098. The decision of the administrative law judge (reprinted in part at Pet. App. 98a-160a; see Pet. 2 & n.1) is reported at 7 F.C.C.R. 8686.

JURISDICTION

The judgment of the court of appeals was entered on January 30, 2001. A petition for rehearing was denied on April 5, 2001 (Pet. App. 161a). The petition for a writ of certiorari was filed on July 3, 2001. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. a. Beginning in the 1980s, the Federal Communications Commission (FCC or Commission) distributed cellular telephone licenses by lottery. In December 1988, petitioner, a general partnership with 14 partners, won a license to provide service in New Mexico. Pet. App. 67a.

At the time of petitioner's application in 1988, one of its general partners, Shafi M. Sharifan, was not a United States citizen. Petitioner's application did not disclose that fact. If petitioner had informed the Commission that one of its general partners was an alien, its application would have been "summarily dismissed" because, "at the time of the events in question, section 310(b)(3) of the Communications Act and [47 C.F.R. 22.43] expressly prohibited the grant of a common carrier radio license to a corporation with any alien officer or director, and the Commission had treated the position of a general partner as being comparable to that of a corporate officer or director." Pet. App. 72a-73a; *id.* at 154a; see 47 U.S.C. 310(b)(3) (1988).

After petitioner won the lottery for the New Mexico license, it filed an amendment to its application on January 9, 1989, under Section 1.65 of the Commission's rules, 47 C.F.R. 1.65, which states that "whenever the information furnished in the pending application is no longer substantially accurate and complete in all significant respects, the applicant shall * * * amend

* * * his application so as to furnish such additional or corrected information as may be appropriate." 47 C.F.R. 1.65(a) (1989). Petitioner's amendment listed Sharifan as a partner and inaccurately stated that all of petitioner's partners were United States citizens. Pet. App. 67a.

Eventually, in a letter dated April 30, 1990, petitioner advised the Commission that the initial applications that it had filed in August 1988 listed a general partner who was an alien. Pet. App. 67a. In that letter, petitioner also claimed that the alien's partnership interest had been transferred to a United States citizen on September 23, 1988. *Ibid.* The Section 1.65 amendment that petitioner filed in January 1989 had failed to disclose any such transfer, however. The amendment stated that none of the changes in the application made any change to the partnership and that there was "no change in the ownership previously identified in the application." *Id.* at 75a. In addition, Sharifan had continued after September 1998 to participate as a partner in petitioner's activities. *Id.* at 140a-142a.

b. Upon learning of an alien's involvement in the petitioner partnership, the FCC's Common Carrier Bureau designated the matter for a revocation hearing to determine if petitioner "lacked candor in failing to reveal that it had an alien general partner or that there had been a change in its ownership structure." Pet. App. 67a (citing *Hearing Designation Order*, 6 F.C.C.R. 2921 (CCB 1991)). At the conclusion of that hearing, the Administrative Law Judge (ALJ) found that petitioner was in violation of 47 U.S.C. 310(b)(3) (1988) at the time it filed its application. Pet. App. 143a. The ALJ also found that petitioner "recognized their predicament," but nonetheless filed an amendment under 47 C.F.R. 1.65 (1989) that represented to the

Commission that petitioner's alien partner was a United States citizen, which the ALJ found to be "[a] deceit, pure and simple." Pet. App. 143a-144a (footnote omitted). The ALJ concluded that petitioner's license should be revoked because petitioner violated Section 310(b)(3) and because petitioner lied about it and tried to conceal the fact from the Commission. *Id.* at 144a, 154a.

The ALJ rejected petitioner's mitigation claim, finding that the record did not support the claim that petitioner had invested a considerable amount of money in the New Mexico operation and concluding that there was no showing that petitioner was furnishing a substantial service to the public. Pet. App. 144a. Accordingly, the ALJ ordered that petitioner's license for the New Mexico station be revoked. *Id.* at 154a.[1]

The Commission's Review Board agreed with the ALJ's revocation of petitioner's license based on petitioner's violation of Section 310(b)(3), and did not reach the candor issue. 9 F.C.C.R. 5098, 5147 (1994).

2. a. The Commission affirmed the ALJ's determination that petitioner lacked candor and revoked petitioner's license.[2] Pet. App. 62a. The Commission recog-

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[1] The ALJ (Pet. App. 153a-154a) and the Board (9 F.C.C.R. 5098) concluded that revocation of petitioner's license, along with the licenses of several other applicants, was warranted on other grounds as well, related to their participation in a risk-sharing arrangement at the time of their applications. The Commission granted various applications for review on that issue, however, and terminated revocation proceedings based on that ground. Pet. App. 33a.

[2] The Commission did not affirm the revocation of petitioner's license based on petitioner's initial violation of 47 U.S.C. 310(b)(3) (1988), because that statutory prohibition against alien officers and directors was removed by Section 403(k)(1) of the Telecommunica-

nized that, in light of the resolution of other issues against petitioner, the Board did not have occasion to address the candor issue but, nonetheless, had correctly found that the ALJ erroneously placed the burden of proof on the licensees rather than the government. *Id.* at 67a, 71a. Accordingly, the Commission "independently reviewed the record under the correct burden of proof." *Id.* at 71a.

Based on a detailed examination of the record evidence (Pet. App. 66a-81a), the Commission concluded that a preponderance of the evidence established that petitioner was aware that one of the general partners was an alien, understood the relevance of the information, and deliberately withheld the information from the Commission. See *id.* at 72a-81a. In particular, the Commission found that petitioner's signing partner and largest equity holder, Robert Bernstein, knew, when he signed the January 1989 amendment for filing with the Commission, that having an alien partner would adversely affect petitioner's chance of getting the construction permit for which it applied after it was selected in the lottery, and that the relevant information in the amendment was false. *Id.* at 71a.

The Commission relied on testimony by attorney William Franklin regarding a December 19, 1998, meeting of petitioner's partnership at which the matter of the alien partner was discussed. Franklin testified that the partnership decided at the meeting to continue to rely on Sharifan as a partner and on the question-

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tions Act of 1996, Pub. L. No. 104-104, § 403(k)(1), 110 Stat. 131. The Commission determined that, in light of the change in the law, the public interest would not be served by revocation of petitioner's license based on the alien ownership violation, itself. Pet. App. 64a-66a.

naire originally submitted to the FCC that erroneously listed him as a United States citizen. Pet. App. 68a. The partners, including Bernstein, conceded that they were told at the meeting that there was an alien partner, but they claimed that they were told by Franklin and the partnership's manager that the alien had been removed. *Id.* at 67a, 69a-70a, 139a.

Thus, Bernstein claimed that, when he signed the false amendment in January 1989, he relied on the assurance of Franklin and the partnership's manager that the alien partner problem "had been taken care of." Pet. App. 73a. The Commission specifically found that this claim by Bernstein was "not credible nor supported by the record." The Commission first noted that, at the time Bernstein signed the false January 1989 amendment, it would not have been reasonable for Bernstein to rely on Franklin "to supply accurate ownership information" because that information was not "a complicated legal question" and because Franklin had not represented the partnership at the time that the initial application was filed. *Id.* at 75a n.4. Moreover, the Commission found that, "[e]ven assuming Bernstein did not know the names of the partners, he would have realized something was wrong when he read the amendment," which he signed to certify the truthfulness of the information it contained. *Id.* at 75a. The Commission explained that, "[i]f, as Bernstein claims, he was told that the alien problem was 'fixed' by substituting a new non-alien partner, signing an amendment stating that there was no change in [petitioner's] ownership should have given him pause." *Id.* at 76a. Moreover, "if Bernstein compared the names on the amendment with those on the partnership agreement, he would have discovered that the names matched. This would have alerted him to the fact that, despite

the ownership change supposedly effected to 'fix' the alien problem, the amendment included the name of the original alien partner (rather than the substitute partner). At that point, he would have also realized that the amendment's representation concerning the partners' citizenship was wrong." *Ibid.* The Commission concluded that, "[u]nder these circumstances, it is simply not credible that," if Bernstein had been informed at the December partnership meeting that "the alien problem was 'taken care of' by replacing the alien partner * * *, he would have signed an amendment less than one month later that states there is no change in ownership without focusing on the alien matter or on the ownership change effected by the substitution." *Ibid.* The Commission also found it not credible that Bernstein failed to talk to the partnership manager about the alien partner after the December meeting. *Ibid.*

The Commission noted that the only record evidence that supported Bernstein's "self-serving version" of what happened at the December partnership meeting was the testimony of two of Bernstein's partners. Pet. App. 76a. The Commission chose to rely on Franklin's contrary testimony instead, based on the Commission's evaluation of "the credibility of Franklin vis-a-vis that of [petitioner's] three testifying partners." *Id.* at 77a. The Commission concluded that the partners had a motive to misrepresent the agreement they reached at the December meeting, but that Franklin, who had not represented petitioner when it filed its initial application that included the alien partner, did not have a comparable motive to misrepresent the partners' agreement and did not have any reason to conceal from the partners the alien problem or how it was resolved. *Ibid.* The Commission rejected petitioner's challenge to

Franklin's testimony as internally inconsistent, finding that the ambiguity in his testimony did not affect his testimony about the December meeting and did not require rejection of that testimony. *Id.* at 77a-78a.

The Commission also found that "a host of documentary evidence" supported Franklin's testimony. Pet. App. 78a. First, the Commission relied on a December 28, 1998, letter from Franklin to Bernstein that accompanied the draft amendment and discussed the partnership's decision at the December 19 meeting to continue to identify Sharifan as a partner, the partnership's discussion of various risks that the application would be dismissed, and the decision that "on balance this alternative minimizes risk" to petitioner. The Commission reasoned, *inter alia*, that "[i]t is unclear why Franklin would have written such a letter if, as [petitioner] claims, the partners never agreed to retain the identification of Sharifan as a partner." *Ibid.* Second, the Commission pointed to the fact that, although the partners testified that each of them learned of the alien partner issue at the December 19 partnership meeting, the minutes of that meeting did not mention any discussion of the alien matter, but indicated that there was a discussion of "confidential matters." *Id.* at 79a. The Commission reasoned that there would have been no reason for secrecy if, as Bernstein and the other partners testified, they were informed by Franklin and the partnership manager that substituting the non-alien partner resolved the matter. *Ibid.* Third, the Commission cited the notes of a telephone conversation between Franklin and the partnership manager about how to present the alien partner problem to the partners at the December meeting. The notes indicated that Franklin's advice was to disclose to the partners the entire situation and have the partners vote on the

desired course of action which, in Franklin's view, would be to let matters lie and hope that no one discovered the alien problem. *Id.* at 79a-80a.

Finally, the Commission noted that, in addition to the documentary evidence that belied the partners' self-serving testimony, the ALJ had made adverse credibility findings as to the three partners who testified. The Commission explained that the ALJ had concluded that the partners who testified on behalf of the applicants and licensees involved in the consolidated proceeding were "perfectly willing, indeed anxious, to bend the truth and/or lie outright . . . . [and] to find a scapegoat (with money of course) that they could blame their troubles on." Pet. App. 80a (citation omitted). With respect to one of petitioner's partners, the ALJ specifically found that, "put in its most charitable light her testimony was less than persuasive." *Ibid.* The Commission found no basis for disregarding those findings, which it noted were "entitled to decisional deference unless those findings irreconcilably conflict with the record evidence." *Ibid.* (citation omitted). The Commission expressly recognized that the findings "do not single out [petitioner's] three testifying partners," but found it significant that the ALJ made the credibility findings "in the context of the partnerships' efforts to blame all of their legal troubles on Franklin," which the Commission noted was "precisely the defense [petitioner] invoked here." *Ibid.* The Commission also found that, for the reasons already discussed, the ALJ's credibility findings "are not in conflict with the record evidence." *Ibid.*

The Commission rejected petitioner's argument that its voluntary reporting of the alien matter to the Commission in April 1990 undermined any intent to deceive the Commission. Pet. App. 80a-81a. The Commission

noted that, even assuming petitioner did not discover the erroneous listing of the alien partner in the 1989 amendment until 1990, petitioner delayed four months before informing the Commission about the error. Moreover, when petitioner did inform the Commission, it failed to disclose that the alien partner continued to participate in partnership matters after the purported transfer of his interest to a citizen partner before the September 1988 lottery. *Ibid.* The Commission found Bernstein's testimony "dubious" when he claimed that he was unaware of Sharifan's continued participation until petitioner obtained new counsel in January 1990 and when he explained that the continued participation of the alien partner was not explained in the April 1990 letter to the Commission because Bernstein "thought there was a second alien." The Commission pointed out that "the letter says nothing about a second alien." *Id.* at 81a.

b. The Commission denied petitioner's petition for reconsideration. Pet. App. 22a. The Commission rejected petitioner's claim that Franklin was not credible and that the Commission erred in relying on the ALJ's determination that petitioner lacked candor because the ALJ failed to make any credibility or demeanor findings about the testimony of the three partners who testified. *Id.* at 16a-17a. The Commission emphasized that, in concluding that petitioner lacked candor, it was not persuaded by petitioner's attempts to impeach Franklin. It noted that, in the Commission's initial decision, "[t]he Commission also recognized (as [petitioner] now observes) that the ALJ's adverse credibility findings do not single out [petitioner's] three testifying partners," but the Commission "nevertheless found that the ALJ's credibility findings were not in conflict with the record evidence and therefore were entitled to decisional

deference." *Id.* at 17a. The Commission also rejected petitioner's challenge to the nature of the sanction imposed compared to that imposed in other cases. *Id.* at 7a-19a.

3. The court of appeals affirmed. Pet. App. 1a-3a. In an unpublished, *per curiam* order, the court held that "[s]ubstantial evidence supported the Commission's determination that [petitioner] lacked candor in failing to reveal that it had an alien general partner and that there had been a change in its partnership structure." *Id.* at 2a. The court noted that the Commission had independently reviewed the record, including "both the testimony of [petitioner's] witnesses and the significant documentary evidence," and that the evidence "was sufficient to support the Commission's conclusion that [petitioner's] partners knowingly and intentionally withheld relevant information from the Commission." *Ibid.* The court concluded that the Commission therefore had "ample basis" to sanction petitioner for its misconduct and that the revocation determination was "well within the agency's broad discretion to apply an appropriate sanction to licensee misconduct." *Ibid.*

ARGUMENT

Petitioner contends (Pet. 9-13) that the decision below conflicts with a number of decisions by other Circuits regarding the minimal standards required for credibility findings by administrative agency adjudicators. Petitioner also asserts (Pet. 13-16) that, even if there were not such a conflict, the Court should grant review to establish such standards.

Contrary to petitioner's claim, the decision below does not create a conflict with decisions of other Cicuits regarding administrative credibility determinations. The court of appeals did not purport to address that

issue. The court simply ruled that the Commission's conclusion, based on the Commission's independent review of the record, including the testimony and documentary evidence, was supported by substantial evidence. Pet. App. 2a. Petitioner does not identify any legal error in the ruling below and the matter does not warrant further review.

1. Petitioner contends (Pet. 9-13) that review is warranted because the court of appeals upheld an agency ruling that accorded deference to an ALJ's generalized credibility finding and, according to petitioner, that affirmance "effectively sanctions" such findings as acceptable. Pet. 11. Petitioner claims that the ruling presents a "clear conflict" with the decision of the Fourth Circuit in *Be-Lo Stores* v. *NLRB*, 126 F.3d 268 (1997), and other circuit court rulings regarding the deference due credibility determinations by agency adjudicators.

The court of appeals' unpublished, summary order in this case does not conflict with the Fourth Circuit's decision in *Be-Lo* or any other case cited by petitioner. In *Be-Lo*, the court of appeals declined to defer to a "perfunctory footnote" in an ALJ's decision in which the ALJ credited all 37 witnesses of one party and discredited all 43 witnesses of the other party. 126 F.3d at 278-279. The footnote simply listed each of the witnesses whose testimony was credited and each of the witnesses whose testimony was not credited, "[i]n so far as there [were] inconsistencies." *Id.* at 278. The court of appeals noted that the ALJ made a single conclusory statement that many of the discredited witnesses committed perjury because they were "terrified about their job security" or were "merely mistaken." *Id.* at 278-279. And the court of appeals emphasized that the administrative review board (the National Labor Relations Board) "just as perfunctorily affirmed

the ALJ in but a single sentence within a footnote." *Id.* at 279. It is in that circumstance that the court of appeals deemed the ALJ credibility finding too generalized and conclusory to warrant "ordinary deference." *Ibid.* And the decisions of other circuits cited by petitioner (Pet. 11-12) are no broader, standing simply for the general propositions that, when making credibility determinations, administrative adjudicators should make express findings, give reasons for discrediting testimony, be sufficiently specific to allow plenary review of the record, and provide cogent reasons for their findings.[3]

The decision by the Federal Communications Commission that was affirmed by the court of appeals in this case met those standards. By contrast to the Board decision under review in *Be-Lo*, the Commission decision in this case was based on the Commission's independent review of the record and contained detailed analysis of the credibility of conflicting statements in the witnesses' testimony. The Commission credited the testimony of one witness over the testimony of others after fully evaluating the motives underlying the witnesses' conflicting testimony as well as considering the documentary evidence and finding that it supported the witness credited by the Commission and not the contrary testimony.

And, significantly, the Commission specifically analyzed the testimony of the partner who had certified the

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[3] Petitioner's contention (Pet. 13-16) that the Court should grant review, even in the absence of any circuit conflict, in order to provide "minimal standards for credibility findings" Pet. 13, that would require "specificity and cogent reasoning in such findings," Pet. 14, is undermined by these very cases cited by petitioner which provide such guidance.

truthfulness of the false information contained in the amendment filed with the Commission that formed the basis for the Commission's conclusion that petitioner lacked candor. The Commission made an independent determination that the testimony of that partner was "not credible nor supported by the record" when he claimed that he relied on the assurances of petitioner's attorney and manager that the matter of the alien partner "had been taken care of." Pet. App. 73a. The Commission found, in light of a number of circumstances, that the partner's testimony was implausible when he claimed that he would not have realized that there was something false in the amendment. For example, the Commission explained that the amendment was evidently false, even based on the partner's own testimony that he believed that the partnership had been changed to remove the alien partner, because the list of partners on the amendment remained the same as the list of partners on the original application and the amendment stated that there was no change in the ownership. See *id.* at 75a-76a. The Commission concluded that, "it is simply not credible that," if the partner had been informed at the December partnership meeting that "the alien problem was 'taken care of' by replacing the alien partner * * *, he would have signed an amendment less than one month later that states there is no change in ownership without focusing on the alien matter or on the ownership change effected by the substitution." *Id.* at 76a.

Thus, petitioner is wrong in contending (Pet. 11) that the court of appeals' affirmance of the Commission's decision in this case "effectively sanctions generalized conclusory 'credibility findings' as acceptable." The court of appeals correctly ruled that the Commission's decision was supported by substantial evidence, which

is the appropriate inquiry upon review of an agency decision after a formal hearing. 5 U.S.C. 706(2)(E). That standard is "extremely deferential to the fact-finder," *Metropolitan Stevedore Co.* v. *Rambo*, 521 U.S. 121, 149 (1997), and simply requires "more than a mere scintilla" of support for an agency's conclusion. *Consolidated Edison Co.* v. *NLRB*, 305 U.S. 197, 229 (1938). As demonstrated above, the evidence in this case amply met that standard and petitioner's assertion (Pet. 8-9 n.3) that review is warranted because it is not clear whether the Commission would have reached the same result absent the ALJ credibility determination is without merit.

2. In the course of discussing the procedural history of the case, petitioner also asserts (Pet. 8) that the decision below conflicts with this Court's ruling in *SEC* v. *Chenery Corp.*, 318 U.S. 80 (1943), that an agency decision "cannot be upheld merely because findings might have been made and considerations disclosed which would justify its order." Pet. 8 (quoting *Chenery Corp.*, 318 U.S. at 94; and citing *Burlington Truck Lines, Inc.* v. *United States*, 371 U.S. 156, 168-169 (1962) ("an agency's discretionary order [may] be upheld, if at all, on the same basis articulated in the order by the agency itself")). Petitioner does not cite that alleged conflict as a reason for granting the petition.

In any event, no such conflict exists. The court of appeals expressly stated that its affirmance of the Commission's decision in this case was "essentially for the reasons stated by the Commission," and cited the substantial evidence that supported the Commission's determination. Pet. App. 2a.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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